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11 AMERICAN RED CROSS BLOOD SERVICES
12 SOUTHERN CALIFORNIA REGION, Improperly
13 Sued As The American Red Cross, STEVE
14 BROWN and ROBERT BROWNING

15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA

18 BRIAN SETENCICH,

19 Plaintiff,

20 v.

21 THE AMERICAN RED CROSS, a non-
22 profit corporation, STEVE BROWN,
23 ROBERT BROWNING and DOES 1
24 through 30, inclusive,

25 Defendants.

Case No. C07-03688 SBA

[Honorable Sandra Brown Armstrong]

**DEFENDANT AMERICAN RED CROSS
BLOOD SERVICES SOUTHERN
CALIFORNIA REGION'S REPLY
REGARDING ITS MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date: February 12, 2008

Time: 1:00 p.m.

Courtroom: 3

**[Complaint Filed: March 13, 2007
First Amended Complaint Filed: November
8, 2007]**

I. Despite the Opportunity to Amend, Plaintiff Still Has Not and Cannot Allege Sufficient Facts to Support a Claim for Association Discrimination

A. Plaintiff's Citation to Unpled Facts Does Not Resolve the Illogical Conclusions Reached In Plaintiff's Amended Complaint

Plaintiff Brian Setencich's claim for association discrimination should be dismissed because the conclusion that American Red Cross Blood Services Southern California Region's ("ARC") decision not to hire him was motivated by his association with Jackson is refuted by the facts alleged in Plaintiff's own complaint. Specifically, as discussed in ARC's motion to dismiss, Plaintiff's accusation that ARC did not hire him because ARC was motivated by a discriminatory animus toward Jackson due to Jackson's disability is inconsistent with the fact that Plaintiff was making a concerted effort to fill the Communication Manager position in order to assist Jackson. (See Motion to Dismiss, p.3, line 21 to p. 4, line 7 and First Amended Complaint ("FAC"), ¶¶ 2 and 16).

In an attempt to address this point in his opposition brief, Plaintiff has submitted a declaration from his attorney regarding ARC's position on Jackson's status as a managing agent. Relying on his counsel's declaration, Plaintiff has attempted to salvage the FAC by stating, in his opposition brief, that Jackson was able to hire his own staff and that Jackson recruited Plaintiff to fill the position of Communications Manager. This representation of Jackson as the sole person who made efforts to fill the Communication Manager position differs significantly from the allegations of the original and amended complaints. Specifically, the FAC does not say that Plaintiff was recruited by Jackson alone, but rather that "[Setencich] was recruited by *defendants* to work as the Communication Manager" (FAC, ¶2) (Emphasis added). Plaintiff has named ARC, Steve Brown and Robert Browning—not Jackson—as the defendants in this matter. Further, Plaintiff's description of the recruitment process includes interviews by "decision-makers" and a "hiring panel"; however, neither the original or amended complaint has identified Jackson as a member of either of these groups. (See FAC, ¶ 15).

The facts alleged in Plaintiff's pleadings do not lead to the conclusion that he has suffered association discrimination. The additional facts he has attempted to add through his counsel's declaration and his opposition brief contradict the allegations in his complaint and therefore do not warrant consideration as support for his claims nor a further opportunity to amend his pleadings. Accordingly, Plaintiff's first cause of action for association discrimination should be dismissed without leave to amend.

B. The Court May Rely On ADA Cases In Analyzing Plaintiff's FEHA Claim

While it is true that FEHA is broader in certain respects than the ADA, the distinctions between these statutes present no meaningful differences with regard to Plaintiff's association discrimination claim. Accordingly, the court may look to decisions interpreting the ADA, such as *Larimer v. International Business Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004), in interpreting parallel provisions in FEHA in order to determine that the past relationship between Plaintiff and Jackson is not within the intended scope of FEHA's prohibition on association discrimination. *See, e.g. Hanson v. Lucky Stores, Inc.*, 74 Cal.App.4th 215, 224 n. 7 (1999) ("decisions interpreting [the ADA] may be useful in deciding cases under the FEHA.") and *Pensingner v. Bowsmith, Inc.*, 60 Cal.App.4th 709 (1998) ("Because the FEHA is modeled after . . . the Americans with Disabilities Act (ADA) 42 U.S.C.A. § 12101 et seq.), interpretations of these laws are 'particularly useful 'to guide the construction'' of the California statute.")¹ Further, Plaintiff has not cited to any cases which suggest or apply a different standard in FEHA association discrimination cases than the one applied in ADA-based cases.

ARC's argument that the prior relationship between Jackson and Plaintiff is not the type anti-discrimination statutes are aimed to protect is valid and warrants dismissing Plaintiff's first purported cause of action for association discrimination.

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II. ARC's Purported "Intent" Not to Hire Plaintiff Cannot Be Inferred From the Facts Alleged in the First Amended Complaint

Notwithstanding Plaintiff's protestations regarding the sufficiency of his pleadings of fraud, he has not alleged any facts from which an "intent" not to hire Plaintiff at the time "Defendants" expressed an intent to hire him can be inferred. While Plaintiff's opposition brief relies on the "Defendants'" alleged animus against Jackson, this does not bear out Plaintiff's conclusion that ARC never intended to hire him. Any purported lack of intent at the time ARC represented an interest in hiring Plaintiff is contradicted by Plaintiff's own allegations. Specifically, Plaintiff's allegations show that ARC's *original intent was to hire Plaintiff* and that an affirmative decision to act on this intent was made and then later changed. (See FAC, ¶¶ 15 and 17). The contradictions within Plaintiff's pleadings notwithstanding, Plaintiff also has not pointed to any relevant authority to support his conclusion that allegations of animus toward Jackson can be construed as evidence of the state of mind of the individuals who indicated an interest in hiring Plaintiff.

Based on Plaintiff's own allegations, it is also clear that what Plaintiff truly relies on to establish that ARC's intentions to hire him were false is the fact that the ARC changed its mind and did not hire him. However, the fact that Plaintiff ultimately was not hired is not enough to establish ARC's intent at the time it allegedly indicated that Plaintiff would be hired. *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.

Because Plaintiff's allegations are insufficient to state a cause of action for fraud, ARC's motion to dismiss the second purported cause of action should be sustained without leave to amend.

III. Plaintiff's Creative Arguments Notwithstanding, Plaintiff Has Failed to State a Claim for Negligent Misrepresentation

As discussed in ARC's motion to dismiss, if ARC made any representation to Plaintiff that he would be hired, this would have involved a promise to perform at some future time. To be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts. *Tarmann v. State Farm Mutual Automobile Insurance Co.* (1991) 2 Cal.App.4th 153, 158.

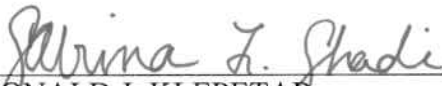
1 Promises to perform at a future time are not actionable as negligent misrepresentation. *See Id.* at
 2 158-159. (“[T]he court properly sustained the demurrer” where, “the gist of both Tarmann’s
 3 fraud and negligent misrepresentation claims is that State Farm said it *would* pay for her repairs
 4 *immediately upon their completion*, it failed to do so, Tarmann could not complete the repairs or
 5 redeem her vehicle, and she lost the use of it until State Farm settled the case;”) (Emphasis in
 6 original).

7 Even if ARC’s alleged representations of a plan to act in the future are considered
 8 statements of existing fact, Plaintiff’s claim for negligent misrepresentation against ARC still
 9 fails. As stated in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407, a case Plaintiff relies
 10 upon in his opposition brief, a party may be liable for negligent misrepresentation when it makes
 11 a false statement “honestly believing they are true, but without reasonable ground for belief.”
 12 Here, Plaintiff has not alleged that ARC honestly believed the truth of the statement that Plaintiff
 13 would be hired; to the contrary, Plaintiff’s opposition brief describes ARC’s statements regarding
 14 its plan to hire Plaintiff as “misrepresentations of an existing fact” because “at the time they were
 15 made *defendant had not intended on hiring Plaintiff.*” (Opposition, p.8, lines 9-10). Such
 16 allegations do not state a claim for negligent misrepresentation. *See Tarmann, supra*, 2
 17 Cal.App.4th at 159 (holding that an alleged false promise cannot be pled as a negligent
 18 misrepresentation which constitutes making a promise with an honest but unreasonable intent to
 19 perform). Accordingly, Plaintiff’s third purported cause of action should be dismissed.

20 Respectfully submitted,

21 Dated: January 29, 2008

BAKER & HOSTETLER LLP

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 24 RONALD J. KLEPETAR
 25 SABRINA L. SHADI
 26 Attorneys for Defendants
 27 THE AMERICAN RED CROSS BLOOD
 28 SERVICES, STEVE BROWN and ROBERT
 BROWNING

PROOF OF SERVICE

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12100 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025-7120. On January 29, 2008, **DEFENDANT AMERICAN RED CROSS BLOOD SERVICES SOUTHERN CALIFORNIA REGION'S REPLY REGARDING ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** will be served on the person(s) listed below:

- ☒ via electronic mail by the United States District Court – Live System.
- ☐ by placing the document(s) listed above in a sealed envelope and causing postage to be placed thereon, fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.
- ☐ by causing the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth below.

Jill P. Telfer, Esq.
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 29, 2008, at Los Angeles, California.


CHARLENE E. STAMPS